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IN THE SUPREME COURT OF THE UNITED STATES
*October Term, 1992*

COLORADO TAXPAYERS UNION, INC. et al.,
*Petitioners,*
vs.
ROY ROMER, individually, and as Governor of the State of Colorado et al.,
*Respondents.*

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

PAGE


STATEMENT OF THE FACTS . . . . . 1
- A. Transportation . . . . . 2
- B. Mailings . . . . . 2
- C. Governor's and Staff's Time . . . . . 3
- D. State Mansion and Security Personnel . . . . . 3

REASONS WHY THE PETITION SHOULD BE DENIED . . . . . 4

I. FEDERAL CIRCUIT COURTS HAVE UNIFORMLY DETERMINED THAT PERSONS SUING IN THEIR CAPACITIES AS VOTERS AND CITIZENS DO NOT HAVE STANDING TO SUE UNDER THE FACTS ASSERTED IN THIS CASE. THE CIRCUIT COURTS' DECISIONS ARE CONSISTENT WITH APPLICABLE UNITED STATES SUPREME COURT DECISIONS. . . . . 4
- A. Petitioners Have Not Suffered a Cognizable Injury. . . . . 5
- B. The Circuit Courts have Uniformly Concluded that the Use of Public Funds to Support the Speech or Activities of Public Officials Does Not Cause Harm to the Free Speech Rights of Citizens or Voters Who Disagree with Such Speech or Activities. . . . 6
- C. The Petitioners do not Dispute that the Tenth Circuit Applied the Proper Test to Determine the Libertarian Party and the Colorado Taxpayers Union did not have Standing. . . . . 8

## TABLE OF CONTENTS

PAGE

II. THIS CASE DOES NOT OFFER A PROPER PLATFORM UPON WHICH THE COURT MAY RESOLVE THE CONFLICT AMONG CIRCUIT COURTS REGARDING WHETHER TAXPAYERS MUST ALLEGE THAT THEY HAVE SUFFERED A MONETARY LOSS IN ORDER TO ACHIEVE STANDING IN FEDERAL COURT. . . . . 9

III. THE TENTH CIRCUIT DID NOT DECIDE WHETHER THE GOVERNOR VIOLATED PETITIONERS' FIRST AMENDMENT RIGHTS. . . 11

CONCLUSION . . . . . 11

## TABLE OF AUTHORITIES

**CASES** **PAGE**

*Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986) . . . . . 6, 8

*Colorado Taxpayer Union v. Romer*, 963 F.2d 1394 (10th Cir. 1992) . . . . . 9

*Colorado Taxpayers Union, Inc. v. Romer*, 750 F. Supp. 1041 (D. Colo. 1990) . . . . . 10

*District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1 (D.C. Cir. 1988) . . . . . 7

*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) . . . . . 8

*Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) . . . . . 8

*Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984) . . . . . 9, 10

*Keller v. State Bar of California*, 110 S. Ct. 2228 (1990) . 5, 6, 8

*Meese v. Keene*, 481 U.S. 465 (1987) . . . . . 4

*Meyer v. Grant*, 486 U.S. 414 (1988) . . . . . 6

*Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354 (8th Cir. 1989) . . . . . 9, 10

*NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990) . . . . . 6

*NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S.

## TABLE OF AUTHORITIES

**CASES** **PAGE**

170, (1981) . . . . . 8

*Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987) . . . . . 7

*Taub v. Kentucky*, 842 F.2d 912 (6th Cir. 1988) . . . . . 9

*United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989) . . . . . 5

*United States v. Johnston*, 268 U.S. 220 (1925) . . . . . 8

*Winpisinger v. Watson*, 638 F.2d 133 (D.C. Cir. 1980) . . . . . 6

**STATUTES**

Colo. Rev. Stat. § 1-45-116(2) (1992 Supp.) . . . . . 3

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Roy Romer, individually and as Governor of the State of Colorado, respectfully requests that this Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case. The Tenth Circuit opinion is reported at 963 F.2d 1394 (10th Cir. 1992). The District Court opinion is reported at 750 F. Supp. 1041 (D. Colo. 1990).

## STATEMENT OF THE FACTS

In 1988, a tax initiative, which would have allowed citizens to vote directly on increases in taxes, was placed on the ballot. Roy Romer, in his capacity as Governor, actively opposed the initiative. In the course of expressing his position, the Governor used certain state resources, including the state airplane, state automobiles and security personnel.

The petitioners filed a lawsuit in the United States District Court for the District of Colorado. They claimed that the Governor violated their First Amendment rights by using state resources and the power and prestige of his office to oppose the Amendment. The Governor asserted that the petitioners lacked standing. The district court found that the petitioners had standing to sue but that the petitioners failed to state a claim. The petitioners appealed, and the Governor cross-appealed on the issue of standing. The Court of Appeals dismissed the appeal on the ground that the petitioners lacked standing.

Contrary to petitioners' assertions, the state resources were directly related to the Governor's speech activities and were *de minimus*.

### A. Transportation

Governor Romer did use the state plane twice to transport him to locations where he presented his views about the amendment. On October 25, 1988, the plane was used for a trip to Pueblo, at a cost of $330 for 1.2 hours of aircraft time. On October 28, 1988, the plane was used for trips to three locations, at a cost of $660 for 2.4 hours of aircraft time. Private organizations reimbursed the State for these costs.

The Governor also used state automobiles on occasion to transport him to sites. Pursuant to state fiscal rules, the Governor is entitled to a state car for both personal and business functions.

### B. Mailings

Mailing costs were insignificant. Other than individual responses to letters expressing views on the amendment, to which any Governor is obliged to respond, only six letters containing the

Governor's signature and referring to Amendment 6 were identified. The text of each letter was similar. Though no one on the Governor's staff has a clear recollection of who drafted the letter, it is likely that the letters were drafted and typed in the Governor's office. It is customary that the correspondence is edited in the Governor's Press Office.

Two letters were printed and distributed at the expense of the AFL-CIO and Blue Cross/Blue Shield of Colorado respectively. The costs of two other letters were paid by political committees.

Two letters were printed in and distributed from the Governor's office to school districts. These letters were sent to 528 school officials. The cost of producing copies totaled $19.53; the cost of envelopes totaled $4.74; and the cost of postage totaled $132. A private organization reimbursed the State for the postage.

### C. Governor's and Staff's Time

The Governor did not set aside any pre-scheduled duties in order to speak against the amendment. The Governor instead fit his amendment activities into his schedule as other commitments permitted. The Governor's staff was used primarily to analyze the amendment and to advise the Governor about its impact.

### D. State Mansion and Security Personnel

The petitioners have complained about the use of the state mansion and of security officers. The Governor is entitled to use the mansion for both personal and professional reasons because it is his living quarters. The security personnel are needed to protect the Governor whether the Governor is performing an official function or a personal function. Colo. Rev. Stat. § 1-45-116(2) (1992 Supp.).

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. FEDERAL CIRCUIT COURTS HAVE UNIFORMLY DETERMINED THAT PERSONS SUING IN THEIR CAPACITIES AS VOTERS AND CITIZENS DO NOT HAVE STANDING TO SUE UNDER THE FACTS ASSERTED IN THIS CASE. THE CIRCUIT COURTS' DECISIONS ARE CONSISTENT WITH APPLICABLE UNITED STATES SUPREME COURT DECISIONS.

Petitioners contend that the circuit courts differ on whether persons who are citizens and voters have standing to sue a public official who has policy-making authority when the official uses public resources which are necessary to communicate his policy to his constituents. This assertion is incorrect.

The standard for determining standing is set forth in *Meese v. Keene*, 481 U.S. 465 (1987), in which the Supreme Court held:

> In determining whether a litigant has standing to challenge governmental action as a violation of the First Amendment, we have required that the litigant demonstrate 'a claim of specific present objective harm or a threat of specific future harm.' *Laird v. Tatum*, 408 U.S. 1, 14, 92 S. Ct. 2318, 2326, 33 L. Ed. 2d 154 (1972). In *Laird*, the plaintiffs alleged that the intelligence-gathering operations of the United States 'chilled' the exercise of their First Amendment rights because they feared the defendants might, in the future, make unlawful use of the data gathered. We found that plaintiffs lacked standing; the Army's intelligence-gathering system did not threaten any cognizable interest of the plaintiffs. While the governmental action need not have a direct effect on the exercise of First Amendment rights, we

> held, it must have caused or must threaten to cause a direct injury to the plaintiffs. *Id.* at 12-13, 92 S. Ct. at 2325. The injury must be "'distinct and palpable.'" *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 556 (1984). (Citations omitted).

*Id.* at 472.

### A. Petitioners Have Not Suffered a Cognizable Injury.

It is well-settled that speech by elected officials does not injure citizens or voters who may oppose the government's position. As noted by this Court:

> Government officials are expected as a part of the democratic process to represent and espouse the views of a majority of their constituents. With countless advocates outside the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern would be limited to those in the private sector, and the process of government as we know it radically transformed.

*Keller v. State Bar of California*, 110 S. Ct. 2228, 2235 (1990).

The Third Circuit reached the same conclusion. *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989). In *Frame*, a citizen argued that the federal government could not collect an assessment from him to support a position with which he disagreed. The Third Circuit

disagreed, noting that the government may be permitted to compel the payment of taxes and to spend money to support controversial speech because the government is elected by the People. Citizens in a representative government elect individuals who will, and must, speak on behalf of the entire population, including those who disagree with all or some of the government's statements. *Id.* at 1131. *See also NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

Petitioners argue that citizens deserve special protection from speech by elected officials in the context of an election on an initiative measure. This Court and circuit courts have rejected the notion that the speech of some elements of our society during the course of an initiative election may be restricted to enhance the relative voice of others. *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988). To the contrary, elected officials are expected to participate in debates involving public issues. *Keller v. State Bar of California*, *supra*; *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986).

### B. The Circuit Courts have Uniformly Concluded that the Use of Public Funds to Support the Speech or Activities of Public Officials Does Not Cause Harm to the Free Speech Rights of Citizens or Voters Who Disagree with Such Speech or Activities.

All the circuit courts which have analyzed the issue of linkage between alleged injuries to the First Amendment rights of citizens and voters, and speech by elected officials which is supported by government funds have employed the "fairly traceable" test. In each instance, the court could not discern any linkage between the speech rights of the disaffected citizens and the expenditure of public resources.

In *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), supporters of Edward Kennedy challenged actions taken by the

incumbent, President Carter, and his aides. They charged that members of the Carter administration illegally expended federal funds to promote Carter's renomination. They argued that the use of public funds by the President's subordinates for salaries, travel expenses and other political outlays related to the 1980 election violated their rights to free expression and free association, infringed upon the effectiveness of their contributions, and deprived them of an equal voice in the nomination process.

The court found that the plaintiffs lacked standing to assert this claim. It could not find "either an irresistible or a legally sufficient connection" between the actions that plaintiffs alleged the federal defendants had taken and the injury that the plaintiffs allegedly suffered. *Id.* at 138. The court concluded:

> The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, cause, and conventions forecloses any reliable conclusion that voter support of a candidate is "fairly traceable" to any particular event. In the case before us, whether an appellant is viewed in the character of a voter, contributor, a noncontributing supporter, or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to appellees. Courts are powerless to confer standing when the causal link is too tenuous.

*Id.* at 139. *See also District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 4 (D.C. Cir. 1988).

The Seventh Circuit reached the same conclusion. *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987). In *Shakman*, voters and candidates claimed that the Cook County, Illinois, patronage system had the purpose and effect of giving the incumbents a significant

advantage in communicating with the electorate, thereby violating their rights of speech and association. The Seventh Circuit denied standing, concluding that the link between patronage and First Amendment rights is particularly attenuated. Even though the officials admitted that one of the purposes of the patronage policy was to help elect candidates, the court found it was only one of many factors which may affect a person's decision on how to cast his ballot. The court held that a person cannot assert injury to his viability as a candidate on the basis of the advantage of incumbency. *Id.* at 1398. *See also Block v. Meese*, *supra* (the guarantee of the right of speech does not prevent the government from adding its voice to debate).

### C. The Petitioners do not Dispute that the Tenth Circuit Applied the Proper Test to Determine the Libertarian Party and the Colorado Taxpayers Union did not have Standing.

The Tenth Circuit denied standing to the Libertarian Party based upon a determination that the Libertarian Party and the Colorado Taxpayers Union did not suffer a distinct and concrete injury as required in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The petitioners do not argue that the *Havens* test is inappropriate. Instead, they argue that the test was improperly applied to the facts of this case. This Court has consistently held that it will not review cases which turn solely upon an analysis of a unique fact situation in the absence of a significant legal controversy. *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

As noted, this case does not present an important, unsettled legal controversy. This Court already has held that expenditures of public funds by policy-making officials does not interfere with the First Amendment rights of those persons who disagree with the speech. *Keller v. State Bar of California*, *supra*. *See also First*

*National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

## II. THIS CASE DOES NOT OFFER A PROPER PLATFORM UPON WHICH THE COURT MAY RESOLVE THE CONFLICT AMONG CIRCUIT COURTS REGARDING WHETHER TAXPAYERS MUST ALLEGE THAT THEY HAVE SUFFERED A MONETARY LOSS IN ORDER TO ACHIEVE STANDING IN FEDERAL COURT.

The Tenth Circuit thoroughly analyzed the major cases involving federal court challenges by state taxpayers to expenditures made by state officials. The Tenth Circuit correctly noted that there is a conflict among the circuits over whether a taxpayer must show a monetary loss in order to achieve standing in federal courts. However, this issue should not be resolved in this case.

The Ninth Circuit has established a test under which the taxpayer must satisfy the following three requirements in cases other than Establishment Clause actions in order to achieve standing: (1) taxpayer status; (2) the appropriation of moneys from the states' general funds; and (3) the spending of those funds for allegedly unlawful purposes. The taxpayer need not demonstrate that his tax burden is increased as a result of the allegedly unlawful expenditure. *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1180 (9th Cir. 1984). Similarly, the Eighth Circuit has concluded that a taxpayer need not show an adverse effect on his tax burden. *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354 (8th Cir. 1989). Both the Sixth and the Tenth Circuits require the taxpayer to show that he will be out of pocket because of the allegedly illegal appropriation. *Taub v. Kentucky*, 842 F.2d 912 (6th Cir. 1988); *Colorado Taxpayer Union v. Romer*, 963 F.2d 1394, 1401 (10th Cir. 1992).

This Court should not address the conflict because the petitioners have not met other elements of taxpayer standing over

which there is no disagreement among the circuits. Both *Hoohuli* and *Minnesota Federation of Teachers* require taxpayers to show a measurable appropriation or disbursement of funds occasioned solely by the allegedly illegal activities. *Minnesota Federation of Teachers*, 891 F.2d at 1357; *Hoohuli*, 741 F.2d at 1178. In both cases measurable funds were appropriated or disbursed solely for the purpose of supporting programs established by the respective legislative branches.

The petitioners have not alleged that money was appropriated from the states general funds for the purpose of combating initiatives. Instead, the money was appropriated for the general functions of the Office of the Governor. Moreover, the petitioners have not alleged or shown that the appropriations or disbursements are measurable. They have shown only that the Governor spent time opposing the amendment and used state resources which are typically available to him to enhance his speech.

Finally, the expenditure of money or resources incidental to the speech activities of a governor is not illegal. As the district judge noted:

> While government funds are involved, these expenditures are incidental. They enhance and extend the reach of the political person; increasing his opportunity to perform his official duties and to communicate with people. These traditional perquisites are merely enlargements of the political personage which are not separable from the man in office.

*Colorado Taxpayers Union, Inc. v. Romer*, 750 F. Supp. 1041, 1045 (D. Colo. 1990).

## III. THE TENTH CIRCUIT DID NOT DECIDE WHETHER THE GOVERNOR VIOLATED PETITIONERS' FIRST AMENDMENT RIGHTS.

Petitioners ask this Court to determine whether the Governor's actions violated their right to petition. This request is premature. The Tenth Circuit did not reach this issue because it dismissed the appeal. Therefore, it would be inappropriate for this Court to determine the substantive issues.

## CONCLUSION

The Court should deny the petition for writ of certiorari.

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